86-92

Supreme Court, U.S.
FILED
JUN 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

APPLICATION FOR WRIT

OF

CERTIORARI

NUMBER _____

SUPREME COURT

OF THE

UNITED STATES

DONNA MCMULLEN ALLEN

VS

JAMES PHILLIPS ALLEN

FROM

THE SUPREME COURT

STATE OF LOUISIANA

BRENT S. GORE
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ON BEHALF OF DEFENDANT,
APPELLANT APPLICANT
JAMES PHILLIPS ALLEN

34 pp

QUESTIONS PRESENTED FOR REVIEW

1) Whether U.S.C.A. Title 10, Section 1408 (c)(1) and the United States Supreme Court case of McCarty v. McCarty, 453 U. S. 210 preempt Louisiana community property laws.

2) Whether the Supreme Court of the State of Louisiana must take judicial notice of the laws of the State of Maryland and give those laws full faith and credit.

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5) Gebhard v Gebhard, 253, Md. 125, 252 A. 2d. 171

6) Joyce v Joyce, 10 Md. App. 516, 276 A. 2d. 692 (1970)

7) Louisiana Civil Code Article 2341 and 2343.1

8) Louisiana Code of Civil Procedure, Article 1391

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10) Maryland Statute: Court's Article Section 3-6A-01

11) McCarty v McCarty, 101 Sup. Ct. 2728

12) Public Law 97-252, Title 10, Section 1002 (a)

13) Racca v Unopened Estate of Breaux, 377 So. 2d. 581 at Page 583

14) Rasbury v Baudier, 410 So. 2d. 262

15) Rogers v Rogers, 408 So. 2d. 359

16) "The Governor's Commission on Domestic Relations Laws"

17) United States Code Annotated, Title 10, Section 1408

3) U.S.C.A. Constitutional Article 4, Section 1

LISTING OF OFFICIAL AND UNOFFICIAL REPORTS OF ANY OPINIONS DELIVERED IN THE COURTS OR ADMINISTRATIVE AGENCY BELOW

None

LIST OF INTERESTED PARTIES

1) Donna McMullen Allen - Original Plaintiff in Trial Court

2) James Phillips Allen - Original Defendant in Trial Court

3) Daniel W. Richey - Attorney for Donna McMullen Allen

4) Brent S. Gore - Attorney for James Phillips Allen

JURISDICTIONAL REQUIREMENT

On May 12, 1986, the Supreme Court of the tate of Louisiana, denied an application for rit of Certiorari from the Third Circuit Court f Appeals of the State of Louisiana.

The Statutory provision conferring this onorable Court with jurisdiction to review the ouisiana Supreme Court Judgment by Writ of ertiorari is U.S.C.A. 28, So. 2d. 1257 (3) herein it states, "Final decrees rendered by he highest Court of a State in which a ecision could be had, may be reviewed by the upreme Court by Writ of Certiorari where alidity of a State Statute is in question on t being repugnant to the Constitution of the nited States or any privilege or right is laimed under the Constitution or Statutes of he United States.

STATUTES FOR REVIEW

1) United States Code Annotated, Title 10, Section 1408 (Attached hereto in the Appendix).

2) U.S.C.A. Constitutional Article 4, Section 1

STATEMENT OF THE CASE

This matter originated under the style of, "DONNA MCMULLEN ALLEN VS JAMES PHILLIPS ALLEN", No. 24,118-B in the Seventh Judicial District Court for the Parish of Concordia, State of Louisiana. Subsequently, there was an appeal to the Third Circuit Court of Appeals for the State of Louisiana and the Louisiana Supreme Court.

On January 25, 1984, Donna Allen filed a petition against James Allen for a post-divorce petition to partition community property. She asserts ownership in the military retirement pay of her ex-husband, James P. Allen. James Allen filed an Exception to the Jurisdiction of the Court on March 26, 1984; however, the Trial Court overruled the Exception to the Jurisdiction.

Donna and James Allen were domiciled in the State of Maryland when Mr. Allen served in the military and when he retired and began receiving military retirement benefits. Thereafter, the couple moved to the State of Louisiana. The State of Louisiana is a

community property State. The State of Maryland is not a community property State.

The Louisiana Courts have held to date that the law of Maryland shall be considered the same as the law of the State of Louisiana and have ignored the fact that the State of Maryland is not a community property State. All the Courts in Louisiana in this matter have held that if the State of Maryland was not a community property State, then Donna Allen would not be entitled to receive military retirement benefits. However, the Courts refused to acknowledge and recognize the State of Maryland's laws but, hold that other State's laws must be presumed to be the same as the State of Louisiana, and therefore, apply community property laws.

The Louisiana Supreme Court in a 4-3 decision denied a Writ of Review on this matter.

The issues were raised in the Trial Court, Appellate Court and the Supreme Court; all in the State of Louisiana. The laws of the State of Maryland and Louisiana, the United

States Code, Title 10, Section 1408, the Federal Decisions concerning this Statute and nature of military retirement benefits, were all raised in the Trial, Appellate and Supreme Court of the State of Louisiana.

ARGUMENT ON QUESTIONS FOR REVIEW

ARGUMENT ON QUESTION FOR REVIEW NO. 1:

The Louisiana Supreme Court decided in a 4-3 decision to deny a Writ of Certiorari from the Third Circuit Court of Appeals of the State of Louisiana. The Louisiana Supreme Court would not recognize the laws of any other State of the United States; further, all laws of all States should be considered the same as Louisiana. Of course, Louisiana is the only civil law State of the United States.

The Allens were married and were domiciled in the State of Maryland. Mr. Allen retired from the military on February 1, 1973. The parties did not live in Louisiana until July of 1977.

Louisiana is a community property State; however, Maryland is not a community property State. The decisions confirming that Maryland is not a community property State will be cited hereinbelow.

The United States Code reflects the enactment of law governing military retirement benefits. Title 10, Section 1408 (c)(1) states

that a Court, beginning June 25, 1981, may treat property solely as a member or as a member and a spouse according to jurisdiction. Since James Allen retired from the military in 1973 in the State of Maryland, the Federal Statute governing military retirement would not be effective against James Allen. The Courts of the State of Louisiana have refused to follow this Statute. In the case at bar, the military benefits accrued beginning in 1973 and the Louisiana Courts could only determine the nature of the military retirement pay if the benefits began after June 25, 1981, as per the Statute.

The Trial Court held that the military retirement accrued entirely during the time the marital domicile was in the State of Maryland. The Trial Court also held that Maryland was not a community property State and the Court held, "We don't have community property here". How then can the Trial Court and the Appellant Court rule that Mr. Allen's retirement pay be considered community property?

Maryland law in 1973 states that James Allen's military retirement benefits were his

separate property. However, the Trial and Appellant Courts ruled that the law of Maryland and the law of Louisiana are the same. It is respectfully submitted that all the Louisiana Courts erred because Maryland is definitely not a community property State as is the State of Louisiana. Further, the Louisiana Courts have held that the law of Louisiana shall be considered the same as the law of the State of Maryland. They refused to give full faith and credit or take judicial notice of the laws of other States.

All the Louisiana Courts were furnished a copy of, "The Governor's Commission on Domestic Relations Laws", which was a Maryland document stating that Maryland was not a community property State. The Louisiana Courts were also cited Maryland case authorities: Abell v Abell, 12 Md. App. 99, 277 A. 2d. 629 (1971); Gebhard v Gebhard, 253, Md. 125, 252 A. 2d. 171; Joyce v Joyce, 10 Md. App. 516, 276 A. 2d. 692 (1970); U.S.C.A. Constitutional Article 4, Section 1; and the Louisiana Courts were

furnished the Maryland Statute: Court's Article Section 3-6A-01, which holds that a Maryland Court may not transfer the ownership of personal property from one spouse to another. Therefore, based on Maryland law, the Louisiana Court could not transfer the property of James Allen to Donna Allen. Once the separate property of James Allen, always the separate property of James Allen.

Louisiana Civil Code Article 2341 and 2343.1 and the cases of Racca v Unopened Estate of Breaux, 377 So. 2d. 581 at Page 583 and Cloud v Cloud, 425 So. 2d. 329 hold that once Mr. Allen's retirement plan was determined to be his separate property, then it cannot be transferred to the community estate but, remains his separate property. In other words, Donna Allen has no claim to his separate property.

Louisiana has consistently held that military retirement pay is not community property but, is the separate property of the spouse who was in the military. Dedon v Dedon, 404 So. 2d. 904, Rogers v Rogers, 408 So. 2d.

359, Evans v Wells, 408 So. 2d. 5, Rasbury v Baudier, 410 So. 2d. 262.

The case of McCarty v McCarty, 101 Sup. Ct. 2728 held that military benefits in the State of Louisiana are a spouse's separate property even though Louisiana is a community property State. The United States Congress apparently overruled the McCarty decision by legislation in 1982 through Public Law 97-252, Title 10, Section 1002 (a) and Title 10, U.S.C.A. Section 1408 (c)(1), which became effective February 1, 1983. However, first as shown above, Mr. Allen's military retirement became effective prior to the enactment of Title 10 of the United States Code and secondly, even if the Title 10 of the U.S.C.A. applies, the law of the State of Maryland and not the law of the State of Louisiana should have applied in this case. However, the Louisiana Courts refused to recognize the laws of the State of Maryland.

As far as I can determine the Louisiana Supreme Court has not heard a case on military retirement benefits since the change in Federal law.

ARGUMENT ON QUESTION FOR REVIEW NO. 2:

U.S.C.A. Constitutional Article 4, Section 1, requires that full faith and credit be given by each State to the public acts, records and judicial proceedings of every other State.

Louisiana Code of Civil Procedure, Article 1391 holds in part, "Every Court of this State shall take judicial notice of the common law and Statutes of every State, territory and other jurisdiction of the United States. The Court may inform itself of such laws in any manner as it may deem proper, and the Court may call upon counsel to aid in obtaining such information. The determination of such laws shall be made by the Court, and not by the jury and shall be reviewable." It is respectfully submitted that the Louisiana Courts refused to take judicial notice of the laws of the State of Maryland and especially since the law of the State of Maryland is different from the law of the State of Louisiana.

BEST A

The Louisiana Code of Civil Procedure, Article 1392 requires the Louisiana Court to follow the statutes of other States. The Governor's Commission Report of the State of Maryland and the Maryland Statutes should have been considered the prevailing law and followed by the Louisiana Courts.

It must be remembered that James Allen submitted laws and Statutes of the State of Maryland to the Trial, Appellate and Supreme Courts of the State of Louisiana, which were not contested by Donna Allen. Donna Allen did not submit any laws of the State of Maryland.

RESPECTFULLY SUBMITTED:

Brent S. Gore

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CERTIFICATE OF SERVICE

I CERTIFY THAT A COPY OF THE FOR... ...ARDINA
HAS BEEN SERVED UPON COUNSEL FO... ...
BY MAILING IT BY FIRST CLASS UNITED STATES MAIL
PROPERLY ADDRESSED AND POSTAGE PREPAID ON
THIS 21 DAY OF July, 1986

Brent S. Gore

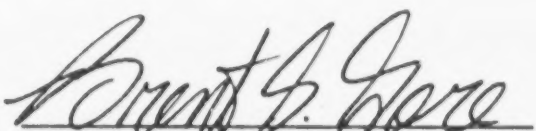
VAILABLE COPY

STATEMENT OF MAILING

I, BRENT S. GORE, hereby certify that, on the 21st day of July, 1986, I served copies of the foregoing Petition by personally placing same in a sealed envelope first class postage thereon fully prepaid in United States Post Office mail box in Ferriday, Louisiana, to each of the parties thereto, as follows:

1. To the Clerk of the Supreme Court of the United States, 1 First Street, N.E., Washington, D. C., 20543, enclosing established filing fee; and
2. On DONNA MCMULLEN ALLEN, through her counsel of record, DANIEL W. RICHEY, P. O. Box 277, Vidalia, Louisiana, 71373.

IT IS FURTHER certified that all parties required to be served have been served, and that the list of such parties is as set forth above.



BRENT S. GORE

APPENDIX

Appendix "A" Allen v. Allen, _____ So. 2d. _____, (La, 1986) Judgment of Court of Appeal, Third Circuit, State of Louisiana, entered on March 5, 1986

Appendix "B" Allen v. Allen, _____ So. So. 2d. _____, (La. 1986) Judgment of Louisiana Supreme Court Entered on May 12, 1986

I certify that all of the appendices attached to the petition for Certiorari filed herein are true copies of what they purport to be.

BRENT S. GORE

APPENDIX "A"

Allen v. Allen, _____ So. 2d _____, (La. 1986)

Judgment of Court of Appeal

Third Circuit, State of Louisiana

Entered on March 5, 1986

Consisting of Pages 1 - 5

NUMBER 84-1147

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

DONNA M. ALLEN

Plaintiff-Appellee

Versus

JAMES P. ALLEN

Defendant-Appellant

ON APPEAL FROM THE SEVENTH JUDICIAL DISTRICT COURT, PARISH OF CONCORDIA, HONORABLE W. C. FALKENHEINER, JUDGE, PRESIDING.

Before: GUIDRY, LABORDE, and KNOLL, Judges.

LABORDE, Judge.

Donna M. Allen, plaintiff-appellee, filed a post-divorce petition to partition community property. The property, she maintains, includes a share of the military retirement pay of her ex-husband, James P. Allen, defendant-appellant. The trial court awarded Donna 45.68% of all of James' future retirement benefits, plus $5,603.86 in arrearages. We affirm.

FACTS

On September 17, 1952, James P. Allen (James) enlisted in the military. He and his

wife, Donna, were married June 19, 1954, in Washington, D.C. Their address of record during the period of James' military service was in the state of Maryland. There is no other indication in the record that Maryland either was or was not the state of their marital domicile. James retired from military service on February 1, 1973. Both parties moved to Louisiana in 1977, where they continued living together as man and wife. On November 4, 1981, James moved, alone, to Mississippi. On February 10, 1982, Donna sued for a divorce from James in the Seventh Judicial District Court, Parish of Concordia, Louisiana. James filed an answer to the divorce petition. The divorce was granted.

Donna next petitioned the district court for a partition of community property, claiming that the former community consisted in part of James' military retirement income. James excepted to the district court's jurisdiction to order distributions of military retirement pay, and also to the district court's jurisdiction over his person. The exceptions were overruled, and Donna was awarded 45.68%

of James' future retirement pay, plus $5,603.86 in arrearages.

On appeal, James alleges that: 1) the district court improperly overruled his exceptions to its jurisdiction; and 2) Donna is entitled to no part of James' retirement pay, for Louisiana's community property laws are inapplicable to military retirement plans.

SUBJECT MATTER JURISDICTION

Before the property was partitioned, the Congress of the United States, on September 8, 1982, adopted the Uniformed Services Former Spouses' Protection Law (USFSPL), Public Law 97-152, now codified in 10 U.S.C. sec. 1408, providing in Section (c)(1):

> "(A) court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member, or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."

We have recently stated that Congress, in passing the USFSPL, intended to obliterate the adverse effect of a United States Supreme Court decision (McCarty v. McCarty, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981)) which had

held that federal law precludes a state court from dividing military nondisability retirement pay pursuant to state law. Menard v. Menard, 460 So. 2d 751 (La. App. 3rd Cir. 1984). The Act was thus given effect retroactive to the date of the aforementioned Supreme Court decision, a date before which our courts recognized that military retirement pay must be classified as community property when acquired during the community. Swope v. Mitchell, 324 So. 2d 461 (La. App. 3rd Cir. 1975).

The application of the USFSPL is limited to courts with jurisdiction over the military service member. 10 U.S.C. sec. 1408 (c)(4) provides:

> "A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court."

Thus, in order for Louisiana to apply its law of matrimonial regimes to military pensions, the service member must be a Louisiana

domiciliary, a Louisiana resident, apart from military assignment, or the member must have consented to the Louisiana court's exercise of jurisdiction.

10 U.S.C. sec. 1408(c)(4)(C) does not require express consent. A military spouse can give implied consent to a state court's jurisdiction by making a general appearance, waiving all jurisdictional objections under LSA-C.C.P. arts. 6(3) and 7. Gowins v. Gowins, 466 So. 2d 32 (La. 1985). James answered the divorce petition, thereby waiving all jurisdictional objections. This same waiver gave Louisiana jurisdiction over all matters incidental to dissolution of the marriage. Gowins, supra, at 37. The requirements of 10 U.S.C. sec. 1408(c)(4)(C) are satisfied, and James' exception to subject matter jurisdiction was properly overruled.

PERSONAL JURISDICTION

James has been domiciled in Mississippi since 1981. By answering the divorce petition, James submitted to the jurisdiction of the district court over his person. La. C.C.P.

art. 7. It was therefore within the power of the state to bind him by every subsequent order in the cause. Imperial v. Hardy, 302 So. 2d 5 (La. 1974). The exception to in personam jurisdiction was, therefore, properly overruled.

DISTRIBUTION OF BENEFITS

Appellant next contends that his military retirement benefits belong to his separate estate because they accrued in Maryland, which is not a community property state. Appellee answers that, should Maryland law control, its "equitable distribution" scheme gives us the discretion to distribute the retirement benefits as did the trial judge.[1] The difficulty of this case is that the record does not enable us to answer either of the two

[1]The formula used was based on a fraction, the numerator of which is the number of years the parties were married while James was in the military, and the denominator of which is the total number of years James was in the military. This fraction (91.36%) of James' benefits was labeled community property, one-half of which (45.68%) was ordered payable to Donna. Where all retirement benefits are shown to have accrued in a community property state, we approve of such a formula. See Thrash v. Thrash, 387 So. 2d 21 (La. App. 3rd Cir.), writ denied, 393 So. 2d 745 (La. 1980); Menard v. Menard, 460 So. 2d 751 (La. App. 3rd Cir. 1984).

arguments. It is not at all clear whether the benefits accrued in Maryland. Nor is it clear whether Maryland courts would, under these circumstances, apportion the benefits under an equitable distribution scheme.

Rights to retirement benefits accrue continuously throughout the husband's period of service, and the wife's entitlement to those benefits should be determined under the law of the states in which the parties were domiciled for the respective periods during which retirement benefits accrued. Menard, supra. But we have also held that unless the law of a sister state upon which a party (in this case, the appellant) relies is placed in evidence, then it is presumed that such law is the same as that of Louisiana. Robertson v. Jimmy Walker Chrysler-Plymouth, 368 So. 2d 747 (La. App. 3rd Cir.), writs denied, 371 So. 2d 833 and 834 (La. 1979); Jagers v. Royal Indemnity Company, 257 So. 2d 806 (La. App. 3rd Cir. 1972), aff'd, 276 So. 2d 309 (La. 1973). Convincing proof of Maryland substantive law on this issue is not in evidence. We will therefore presume that Maryland law and

Louisiana law are the same. The trial judge made the same presumption in calculating Donna's award. We therefore find no error in his ruling.

For the above and foregoing reasons, the judgment of the district court is affirmed. Costs on appeal are taxed to the appellant.

AFFIRMED.

APPENDIX "B"

Allen v. Allen, _____ So. 2d _____, (La. 1986)

Judgment of Louisiana Supreme Court

Entered on May 12, 1986

THE SUPREME COURT OF THE STATE OF LOUISIANA

DONNA MCMULLEN ALLEN

VS NO. 86-C-0587

JAMES PHILLIPS ALLEN

- - - - - - - - - - -

IN RE: Allen, James Phillips; applying for Writ of Certiorari and/or Review; to the Court of Appeal, Third Circuit, Number 84-1147; Parish of Concordia 7th Judicial District Court Div. "B" Number 24,118.

- - - - - - - - - - -

May 12, 1986

Denied.

WFM

FAB

JCW

HTL

DIXON, C.J., CALOGERO & DENNIS, J.J., would grant the writ.

Supreme Court of Louisiana
May 12, 1986

Clerk of Court
For the Court